

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SEVENTEENTH REGION

Tulsa, Oklahoma

LA QUINTA INNS, INC.

Employer

and

Case 17-RC-12154

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
LOCAL UNION NO. 523

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. **1/**
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act: **2/**

All housekeeping and maintenance employees and front desk sales representatives employed by the Employer at its facility at 10829 East 41<sup>st</sup> Street, Tulsa, Oklahoma, excluding office employees, director of housekeeping, guards and supervisors as defined by the Act

**DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees

OVER

engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 523

#### LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. **Excelsior Underwear, Inc.**, 156 NLRB 1236 (1966); **N.L.R.B. v. Wyman-Gordon Company**, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, two copies of an election eligibility list, containing the names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned/Officer-in-Charge of the Subregion who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Region 17 office on or before February 6, 2003. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

#### RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by February 13, 2003.

Dated August 6, 2003

at Overland Park, Kansas

Regional Director, Region 17

1/ The Employer is a Texas corporation engaged in the business of operating a hotel in Tulsa, Oklahoma.

2/ The Petitioner seeks an election in a unit consisting of all housekeeping and maintenance employees and front desk sales representatives employed by the Employer at its hotel facility at 10829 East 41<sup>st</sup> Street, Tulsa, Oklahoma, excluding sales persons, guards and supervisors as defined by the Act. The parties agreed, and I find, that any unit found appropriate should include all maintenance employees and all housekeeping employees employed by the Employer at its 41<sup>st</sup> Street, Tulsa, facility, including the head of maintenance (Clint Lane) and excluding the director of housekeeping (Amy Turner), office personnel, guards and supervisors as defined by the Act. The Employer sought, and the Petitioner opposed, the exclusion of employee Dwayne Kaup, classified by the Employer as a Front Desk Sales Representative II (FDSR II).

## **THE ISSUES AND DETERMINATION**

In seeking the exclusion of the FDSR II position from the bargaining unit, the Employer contends that Kaup, the current employee in that position, possesses sufficient indicia of supervisory authority as set forth in Section 2(11) of the Act. In contrast, the Union contends that Kaup does not exercise such authority. For the reasons set forth below, I find that Kaup does not possess sufficient indicia of supervisory authority within the meaning of Section 2(11) of the Act, and I shall include him in the bargaining unit.

## **THE FACTS**

### **The Employer's Business**

The record reflects that the Employer operates hotels in Tulsa, Oklahoma. One of them is located at 10829 East 41<sup>st</sup> Street ("41<sup>st</sup> Street property"), and the other is located near the Tulsa

airport ("airport property"). The 41<sup>st</sup> Street property is the work location of the employees petitioned for by the Union. The Employer's witness, Richard Greenwood, is General Manager at this location. By Greenwood's account there are a total of 15 employees, not including himself, employed at the 41<sup>st</sup> Street property: 2 in maintenance, 8 in housekeeping, and 5 in front desk sales.

Dwayne Kaup has worked for the Employer for approximately 15 years. He was hired as a front desk sales representative (FDSR) at the airport property in February 1988. Thus, when Greenwood was hired as General Manager of the airport property in January 1994, Kaup had already worked for the Employer for approximately 6 years. In August 2001, Greenwood was transferred to the 41<sup>st</sup> Street property. Three months later, in November 2001, Kaup transferred to the 41<sup>st</sup> Street property at Greenwood's request.

### **Greenwood's Testimony**

#### **Kaup's Supervisory Authority**

About 6 months after Greenwood began working for the Employer he promoted Kaup to the position of manager-on-duty at the airport property. According to Greenwood, this promotion authorized Kaup to assume Greenwood's responsibilities in Greenwood's absence, whether he was on vacation, sick leave or off for any other reason. He stated that with this promotion he conferred upon Kaup essentially the same authority that Greenwood had as general manager. He authorized Kaup to hire, fire, discipline, and transfer employees. Greenwood said he conferred this authority verbally and – later, at Kaup's request – in writing. Greenwood could not produce the original or a copy of this writing.

Approximately 1½ - 2 years ago, Kaup's title changed from manager-on-duty to front desk sales representative II. By Greenwood's account this change was made only to accommodate a new payroll system and had no effect on Kaup's authority.

Greenwood stated that, since Kaup's promotion in 1994, Kaup has regularly exercised and still exercises supervisory authority in numerous ways. The record reflects that Greenwood regularly takes off work every Thursday and Friday. By Greenwood's account, since Kaup's promotion Kaup has assumed Greenwood's role as general manager for those two days each week. Kaup has frequently hired, fired and disciplined employees, directed employees in their work, approved employees' sick leave and completed the paperwork for employee injuries. The Employer introduced documentary evidence indicating that, prior to his November 2001 transfer to the 41st Street property, Kaup had involvement in the hiring of three employees, firing of two employees, orientation of five new employees to their jobs, approval of sick leave for one employee, completion of worker's compensation paperwork for two employees, and issuance of two employee warnings. Kaup's signature appears on the line next to "Manager's Signature," "Supervisor's Signature," "Employer" or "Employer's Representative" on all of the documents.

Following Kaup's November 2001 transfer to the 41st Street property, Kaup's signature appears on the line next to "Manager's Signature" on Employer's Exhibit 1 and next to "Employer or Authorized Representative" on Employer's Exhibit 3. Exhibit 1 is an employee master data sheet for employee Mike Pelland. Greenwood testified that this sheet is completed when any new employee is hired. Exhibit 3 is a form the Employer submits to the Department of Justice certifying that the new hire appears to the Employer to be eligible to work in the United States. Both Exhibits are dated March 4, 2002.

The Employer introduced two more documents like Exhibit 1, both with Kaup's signature on the manager's signature line. However, Exhibit 1 and Exhibit 3 are the only two documents introduced by the Employer that were signed by Kaup after his transfer to the 41<sup>st</sup> Street property in November 2001.

Employer's Exhibit 4 is a new employee checklist that was completed upon the hire of employee Guy Jones. Greenwood testified that the Employer previously used this form to ensure that it communicated necessary information to new employees. Kaup's signature appears on the line for supervisor's signature, and the document is dated July 23, 2001, four months before Kaup transferred. Greenwood testified that Kaup used this checklist to train or orient new employees regarding the clocking in system, schedules, the Employer's policy on absences, job duties, primary responsibilities, and the Employer's performance management system. The Employer introduced four more employee checklists identical to this one, all with Kaup's signature on the supervisor's signature line and all dated prior to Kaup's transfer to the 41<sup>st</sup> Street property.

The record reflects that Kaup exercised additional authority at the time he completed the employee checklist for employee Brooke Hilton (Exhibit 6, p. 3). This checklist is dated August 22, 2001. Greenwood testified that at the time this checklist was completed, Greenwood had already transferred from the airport property to the 41<sup>st</sup> Street property and that Kaup, who had been left in charge of the airport property with Greenwood's remote supervision, hired Hilton without first consulting Greenwood. Greenwood recalled that he had not even met Hilton prior to her hire.

The Employer further introduced a "Sick Leave Payment Form" on which Kaup's signature appears on the manager's signature line and is dated September 4, 1997. (Employer's Exhibit 7).

Greenwood testified that, in order for an employee to receive sick pay, this form must be completed and signed by a supervisor. He stated that no one besides himself or Kaup has the authority to fill out this form. In addition, the information entered on the form can only be obtained from printed wage reports or from confidential personnel files on the manager's computer. Greenwood testified that only he and Kaup have access to these reports and files on the manager's computer, which is located in Greenwood's office.

*Kaup's Exercise of Independent Judgment*

Greenwood recalled several instances in which he believed Kaup specifically exercised independent judgment in his performance of the above duties. Greenwood recalled that, when the head of housekeeping, Amy Turner, once fired an employee, either Kaup alone or Kaup and Turner hired two new employees to fill the former employee's position. Greenwood stated that Kaup did not consult him prior to this hire, but merely informed him of the decision after the fact.

Greenwood further testified that Kaup has interviewed employees and made recommendations to Greenwood based on his interviews and that Greenwood has "always acted on his recommendation(s)." He also noted that there have been occasions when the hotel has been short-staffed and Kaup has contacted Labor Ready, without first consulting Greenwood, to bring in additional help.

Greenwood recollected that Kaup also has made the unilateral decision to send an employee home. The employee had arrived at work with an injured ankle and did not have a medical release from her physician.

**Kaup's Testimony**

As stated above, Greenwood testified that Kaup has regularly and frequently exercised the authority of a general manager at both properties, that he has used independent judgment in the exercise of this authority, and that this authority transferred with him in full from the airport property to the 41<sup>st</sup> Street property. Kaup gave a different version of the facts.

**Kaup's Supervisory Authority at the 41st Street Property**

Kaup testified that since his transfer to the 41<sup>st</sup> Street property he has had no supervisory authority. He testified that he has never hired, fired or directed anyone in his or her work. He stated that he has not approved anyone's request for time off work, set anyone else's schedule, or demoted anyone. He said that Greenwood sets all employees' hours, and hires and fires all employees. He further testified that he has no input regarding what other employees are paid. He said that the Employer's management determines pay according to a set wage scale.

Kaup testified that he does not think of himself as a supervisor and is certain other employees do not view him as such either. When Greenwood is absent on Thursdays and Fridays, Kaup considers himself to be only "babysitting" the hotel: "...what I mean by babysitting is if anything major happened or anything I was to call corporate office and get their opinion on what to do." When questioned as to whether or not he identified himself as the manager-on-duty on the phone to the Employer's Assistant General Counsel and Vice President Jeffrey Schagren, Kaup said he could not recall, and that he thought the "manager-on-duty" position had been abolished years before.

Kaup admitted that Greenwood has in the past asked him to make out the employee schedule. But he said that he has refused this request and that Greenwood ultimately made out the schedule himself. Kaup testified that Greenwood is the one who always orders the continental breakfast



supplies every other week. He said that he has asked Greenwood if they could order various office supplies and that Greenwood has approved these requests. The record does not establish who actually placed the orders for additional supplies.

Kaup testified that he is not the only one besides Greenwood who has a key to Greenwood's office and who has access to Greenwood's computer. He said he believes at least one other employee, Janice Price, has had a key and that Carolyn McGrew has had one ever since Kaup went on medical leave in September 2002. He testified that maintenance employee Clint Lane and Housekeeping Supervisor Turner also had access to Greenwood's office. Kaup said that anyone who had access to Greenwood's office also had access to Greenwood's computer, since the password to the computer is printed on the computer.

*Kaup's Exercise of Independent Judgment at the 41st Street Property*

Kaup also testified that since his transfer in November 2001, he has not exercised any independent judgment in the performance of any of his duties. Regarding Employer's Exhibits 1 and 3 and the hiring of Mike Pelland, Kaup stated that he never interviewed Pelland, but merely followed Greenwood's order to prepare the paperwork for Pelland's hire.

Kaup gave further examples of his lack of exercise of independent judgment. He testified that he once received a phone call from an employee who was calling in sick. Greenwood was on vacation, so Kaup immediately called Patty Toone, the Employer's legal counsel. Toone told him to make a note to Greenwood and have Greenwood write up the employee.

Kaup stated that he has received employee complaints since he transferred to the 41<sup>st</sup> Street property, but that he has always referred those complaints directly to Greenwood. He also admitted that he made bank deposits but that he does so only according to Greenwood's directions and only during working hours.

## **ANALYSIS AND DETERMINATION**

Section 2(11) of the Act provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An employee meets this statutory definition if he or she: (1) possesses at least 1 of the 12 authorities listed above, (2) in the interest of the employer, and (3) exercises independent judgment in the execution of that authority. *NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 573-574 (1994).

The party asserting supervisory status bears the burden of proof on that issue. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 149 L.Ed. 2d 939, 121 S. Ct. 1861 (2001); *Alois Box Co.*, 326 NLRB 1177 (1998); *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998); *Bennett Industries*, 313 NLRB 1363 (1994). I find that the Employer has not sustained its burden of proof and that Kaup does not currently possess Section 2(11) authority.

### **Kaup's 2(11) Authority at Airport Property**

Kaup testified that his current title is Front Desk Sales Representative, but said, "It is actually a fancy word for desk clerk." When asked how long he has been a "desk clerk" for the Employer he responded, "Pretty much since February 1st, 1988." When asked what his job duties were upon transfer to the 41<sup>st</sup> Street property he replied, "Pretty much what I was doing at the airport."

Greenwood testified that at one point the head of housekeeping, Amy Turner, fired an employee and that either Kaup or she and Kaup both hired two new housekeeping employees to replace the former. But he didn't define what level of participation Kaup had in the hiring of

these two new employees. Kaup may have independently selected, interviewed and hired the employees – completing all necessary paperwork and making all of the decisions on his own -- or he may have merely performed some routine tasks to assist Turner. The record is not clear on this point.

As examples of Kaup's use of independent judgment, Greenwood pointed to instances when the Employer has been short-staffed at one of the properties and Kaup transferred employees to cover these shortages. However, Greenwood did not indicate what Kaup's specific role was in these transfers. He did not state whether, for example, Kaup was told, "Call property x and ask for 10 employees to be sent over," and then merely obeyed the order, or whether Kaup assessed the situation himself, determined that there was a shortage of employees, decided to seek a transfer of employees, and then requested the transfer.

In addition, while Kaup signed employee master data sheets (the forms completed when a new employee is hired or terminated) before November 2001, the record does not reflect whether or not he exercised independent judgment in the completion of these forms. The hiring forms, for instance, appear to contain basic information about the new employee, such as name, address, marital status, and hire date. The record is not clear on whether Kaup input this information himself or whether he merely printed already completed forms off a computer and then just added his signature and a date.

Finally, Greenwood stated initially that he "has always" acted on Kaup's recommendations. He later admitted, however, that he had also reversed Kaup's decisions. Employer's Exhibit 16 documents the termination of employee Angelic Williams. It is dated July 1, 1999, and has Kaup's signature on the line for manager's signature. Although the form states that Williams was not eligible for rehire, Greenwood testified that he later rehired Williams himself.

Despite the record's slight ambiguities on the question of whether or not Kaup had supervisory authority while working at the airport property, the record ultimately establishes very clearly that Kaup did, in fact, have such authority. The Employer introduced 15 documents that Kaup signed before his transfer as supervisor, manager, manager-on-duty, employer, or employer's representative. Some of those documents reflect Kaup's unilateral decisions to terminate employees and his recommendations that certain employees be held ineligible for rehire. While there is evidence that Greenwood later rehired an employee whom Kaup had deemed ineligible for rehire, there is no evidence that Greenwood did the same on any of Kaup's other recommendations.

The Employer's exhibits illustrate that Kaup exercised disciplinary authority and independent judgment in the carrying out of that authority. He issued warnings to two employees in October 1997 without having first consulted Greenwood. Greenwood's testimony regarding Kaup's solicitation of extra help from Labor Ready when the hotel was short-staffed further demonstrates Kaup's use of independent judgment prior to November 2001.

#### **Kaup's Current 2(11) Authority**

Regardless of the supervisory functions Kaup performed at the airport property, if that authority did not transfer with him to his position at the 41<sup>st</sup> Street property he is not currently a Section 2(11) supervisor. Kaup's status turns on what duties he has performed since November 2001. *The Ryan Aeronautical Co*, 132 NLRB 1160 (1961). Although I find that Kaup exercised supervisory authority in his position at the airport property, for the reasons given below I do not find that such authority transferred with him to his position at the 41<sup>st</sup> Street property.

First, Kaup's title changed when he transferred. Greenwood testified that Kaup's title changed approximately 1 ½ -2 years ago, which is precisely the time of Kaup's transfer. Greenwood said

that the change was made simply to accommodate a new payroll system. However, the record indicates that it was because Kaup's duties had changed.

Kaup testified that the Employer's Regional Vice Presidents, Karen Pina and Justin Holley, contacted him before he transferred and advised against this move. He said that they told him that he would be "lowering" himself by transferring to the 41<sup>st</sup> Street property, a smaller hotel than the airport property. He testified that they told him that his position at the 41<sup>st</sup> Street property would be different from what it had been at the airport property. He said that he understood them to be offering him a transfer to either a housekeeping supervisor's position or to an FDSR position.

The record reflects that Kaup's duties did, in fact, change once he transferred locations. In the course of his time at the airport property, on at least 15 different occasions, he hired, fired, and disciplined employees, sent them home, approved their sick leave and completed their paperwork for worker's compensation benefits. However, the record shows that since his transfer to the 41<sup>st</sup> Street property in November 2001, Kaup has signed only two documents relating to one other employee, Mike Pelland. On one of those documents Kaup listed his title as "FDSR II," not as manager or supervisor. Plus, he testified that he did not exercise any independent judgment concerning these documents. He said that Greenwood had asked him to do him a favor by filling out Pelland's paperwork.

Kaup testified that, since November 2001, he has not hired, fired, promoted or demoted anyone, directed anyone else's work, told others when to arrive at work, or approved others for time off -- not even in Greenwood's absence. Since November 2001, when employees have directed their complaints to Kaup, he has directed them to Greenwood. When Kaup has been confronted with issues that require the use of independent judgment, in Greenwood's

absence he has contacted other members of management for directions on what to do. In the situation to which Kaup testified -- when an employee called in sick to work -- Kaup contacted the Employer's legal counsel, Patty Toone. Toone, not Kaup, made the decision about what course of action to take. Toone did not even direct Kaup to write up the employee. She told him to make a note to Greenwood for *Greenwood* to take care of the situation when he returned. Kaup obeyed her order.

The record did not establish that Kaup is the only one with access to Greenwood's office and/or computer. Kaup testified that there are at least four other individuals whom he believes have had access or who currently have access to this room and computer. Nor did the record establish that Kaup has the authority to order supplies, or that he exercises independent judgment in the event he orders supplies. Kaup testified that Greenwood has approved his request for orders of more office supplies. Greenwood makes the decision regarding what to order, and may possibly place the order himself. The record does not clarify this point.

The Employer points to secondary indicia of supervisory authority, which is helpful in determining Section 2(11) status but is not conclusive. Employer witness Schagren testified that several weeks prior to the hearing Kaup, concerned about some anti-union material, called Schagren and identified himself as the manager-on-duty. Kaup testified that he did not recall having said this. Regardless, even if Kaup had introduced himself as the manager-on-duty, this would not prove that he is a supervisor under Section 2(11).

Similary, the Employer points to the fact that Kaup is paid at a higher wage rate than other employees as evidence of his Section 2(11) authority. However, the record does not make clear whether this discrepancy in pay is due to Kaup's possession of greater authority or simply to the

fact that he has greater tenure than the other FDSRs. In any event, higher pay alone does not establish supervisory authority. *Ken Crest Services*, 335 NLRB No. 13 (2001).

The Petitioner points to secondary indicia of Kaup's *lack of* supervisory authority to prove that Kaup is not a 2(11) supervisor. All the other non-supervisory employees at the 41<sup>st</sup> Street property are paid on an hourly basis. So is Kaup. All the other employees work set schedules. So does Kaup, from 7:00 a.m. – 3:00 p.m., Monday through Friday. In October 2002, the Employer changed its health insurance policy, greatly reducing the benefits of hourly employees. Kaup receives the reduced benefits that all the other employees receive. The Employer did not explain why, if it believes Kaup to be a supervisory employee, it gave him the lesser benefits that it gives all of its non-management employees.

Although Greenwood testified that he believes Kaup to be endowed with Section 2(11) authority, since his transfer to the 41st Street property in November 2001, Kaup has not exercised such authority or exercised independent judgment. See, e.g. *Chevron Shipping Co.*, 317 NLRB 379 (1995); *J. C. Brock Corp.*, 314 NLRB 157 (1994); *Clark Machine Corp.*, 308 NLRB 555 (1992); *McCullough Environmental Services*, 306 NLRB 565 (1992); *Quadrex Environmental Co.*, 308 NLRB 101 (1982); *Omaha Neon Sign Co.*, 170 NLRB 1385 (1968). Based on the foregoing, I find that the Employer has not satisfied its burden of proof and that Kaup does not possess Section 2(11) authority at the 41st Street property. According, I find that he should be included in the petitioned-for bargaining unit.

#### **DISMISSAL OF EMPLOYER'S MOTION**

I also deny the Employer's Motion to Dismiss Petition Following An Administrative Investigation. The Employer contends that Kaup obtained authorization cards from the Union and solicited signatures on those cards from employees. It argues that, as a supervisor, Kaup's

involvement taints the Union's petition. However, I find that Kaup is a statutory employee, not a supervisor. As such, any solicitation by Kaup of Union support from other employees would not taint the petition.

177-8560

177-8560-1000

177-8560-1500

177-8560-4000

177-8560-5000

177-8560-6000

177-8560-9000

177-8560-9500

177-8580-7000